

SECONDARY EMPLOYER NOT BOUND BY "HOT CARGO" CLAUSE

Local 1976, United Bhd. of Carpenters v. NLRB,
357 U.S. 93 (1958)

The Sand Door and Plywood Company of Los Angeles supplied general construction contractors with doors manufactured by the Paine Lumber Company of Oshkosh, Wisconsin, a non-union plant. The Carpenters (Local 1976) refused to install the doors. Sand filed charges with the National Labor Relations Board¹ contending that the union was illegally encouraging its members to effect a secondary boycott² in violation of the Taft-Hartley Act.³ The union maintained that its action was proper because a "hot cargo" clause⁴ was contained in its collective bargaining agreement with the general contractors. The NLRB ordered the union to cease and desist from the acts charged by Sand and the order was upheld on appeal.⁵ The Supreme Court of the United States affirmed the decision, holding that a "hot cargo" clause in a collective bargaining agreement cannot be asserted as a defense to an alleged unfair labor practice prescribed by Section 8(b)(4)(A) when the employer does not consent to the use of the clause.⁶

The position of the NLRB toward the "hot cargo" clause as a defense to Section 8(b)(4)(A) has been unstable, usually changing with the appointment of new personnel. When first confronted with the issue in *Conway's Express*,⁷ the Board held that the employer consented in advance to the secondary boycott and acquiesced in its enforcement.

¹ Sand Door and Plywood Co., 113 N.L.R.B. 1210 (1955).

² 29 U.S.C. § 158(b)(4)(A) (Supp. 1951). "It shall be an unfair labor practice for a labor organization or its agents. . . (4) to engage in, or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."

³ 29 U.S.C. § 141 (1947) (Supp. 1951).

⁴ A typical "hot cargo" clause usually reads: "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through a picket line of a union or refuse to handle unfair goods." Pittsburgh Plate Glass Co., 105 N.L.R.B. 741 (1953).

⁵ *NLRB v Local 1976, United Bhd. of Carpenters*, 241 F.2d 147 (9th Cir. 1957).

⁶ *Local 1976, United Bhd. of Carpenters v NLRB*, 357 U.S. 93 (1958). The Court heard simultaneously an appeal on the same issue from the Court of Appeals of the District of Columbia. It reversed the decision in favor of the Teamsters and affirmed the decision pertaining to the Machinists. *Teamsters Union v NLRB*, 247 F.2d 71 (D.C. Cir. 1957).

⁷ 87 N.L.R.B. 972 (1949).

There was, therefore, literally no strike or concerted refusal to work as the employees were exercising their contractual privilege.

In 1954, with three newly appointed members,⁸ the Board shifted its position.⁹ Two members declared the clause invalid because it was contrary to the public policy expressed in the Taft-Hartley Act.¹⁰ The chairman,¹¹ in a concurring opinion, held the clause valid but unenforceable because the factual situation differed from *Conway's Express*. He stated that the union unlawfully induced and encouraged its members to refuse to work.¹² One year later, the Board¹³ further limited the use of the clause as a defense by not allowing the union to appeal directly to its members to refuse to handle "unfair goods"; only the employer could instruct the employees to cease handling the "unfair goods" even though the union has the obligation of notifying its members of their contractual rights.¹⁴

Since the *American Iron and Machine Works* case,¹⁵ a union is restricted from appealing to its members directly or indirectly even though the employer may acquiesce in the refusal to handle "unfair goods." The language of this decision, as pointed out by the dissent, is so broad that union officials cannot discuss a "hot cargo" clause at a membership meeting.¹⁶ Just as a majority of the Board has not been able to agree on whether a "hot cargo" clause is a valid defense to Section 8(b)(4)(A), similarly United States courts of appeals have not been in accord.¹⁷

The existing conflict as to how the "hot cargo" clause can be valid and yet unenforceable is not resolved by the Supreme Court's decision. The Court held that the clause was valid, but that it was not a defense when the employer explicitly instructed his employees to handle the

⁸ Guy Farmer, Phillip Ray Rodgers and Albert C. Beeson.

⁹ McAllister Transfer Co., 110 N.L.R.B. 1769 (1954).

¹⁰ Rodgers and Beeson held that the intent of Congress was to protect neutral employers and the public welfare from labor disputes; therefore a secondary employer could not contract with the union to waive the statutory protection of the public interest.

¹¹ Guy Farmer.

¹² Murdock and Peterson, the dissenting members, upheld the validity of the clause and stated that the facts were similar to those in *Conway's Express*.

¹³ There was one new member, Boyd Leedom, who replaced Albert Beeson.

¹⁴ Sand Door and Plywood Co., *supra* note 1.

¹⁵ 115 N.L.R.B. 800 (1956). Stephen Bean was a new addition to the Board, having replaced Chairman Farmer who had resigned.

¹⁶ *Id.* at 805.

¹⁷ Two Courts of Appeals, the Second Circuit and the District of Columbia, have upheld the use of the clause as a defense to Section 8(b)(4)(A). *Teamsters Union v. NLRB*, 247 F.2d 71 (D.C. Cir. 1957); *Teamsters Union v. NLRB*, 245 F.2d 817 (2d Cir. 1957); *Rabouin v. NLRB*, 195 F.2d 906 (2d Cir. 1952). The Court of Appeals, Ninth Circuit, has held that the clause is not a defense when the employer does not consent to the use of the clause. *NLRB v. Local 1976, United Bhd. of Carpenters*, 241 F.2d 147 (9th Cir. 1957).

"unfair" goods.¹⁸ This is essentially the same conclusion reached by Chairman Farmer in the *Sand Door and Plywood* case.¹⁹ The majority feels that Congress intended to give to the employer a freedom of choice to relieve himself of the pressures of a secondary boycott. This freedom of choice must be available to the employer at the time the situation arises even though the union and the employer entered into a prior agreement.²⁰ Because of business practicalities the employer must be left free from coercion to make the appropriate decision. Looking at the practical aspect of the situation, the Court feels that the union is powerful enough to pressure the employer into making this provision in the first instance.²¹ Thus, it cannot actually be said that the "hot cargo" provision was voluntarily made at the time of the collective bargaining agreement.

The major premise of the Court is that the intent of Congress was to reserve to the secondary employer a freedom of choice upon whether or not to honor a "hot cargo" clause. The legislative history of the Taft-Hartley Act reveals no specific prohibition on including the clauses in a collective bargaining agreement.²² Furthermore, there is nothing in the language of Section 8(b)(4)(A) which prohibits the type of employer-union cooperation contemplated by these contracts in effecting a secondary boycott.²³ The union is placed in the curious position of having a valid agreement which cannot be enforced against an unwilling employer. The union cannot appeal to its members to engage in conduct permitted by the contract. The result is that the union is left without an adequate remedy. If it should sue the employer to obtain specific performance of the contract, it is highly doubtful that the Court would allow the union to achieve indirectly by injunction what it cannot achieve directly through the inducement of its members.²⁴ If the union should maintain an action for damages,²⁵ the amount would be too speculative and more than likely preclude the union from recovering a judgment.²⁶ The employer is put in the enviable position of being able to exercise his freedom of choice twice: at the time of the collective bargaining agreement and at the time the appeal for a secondary boycott is made by the union. The employer may now repudiate this part of the agreement

¹⁸ Local 1976, United Bhd. of Carpenters v NLRB, *supra* note 6.

¹⁹ Sand Door and Plywood Co., *supra* note 1.

²⁰ Local 1976, United Bhd. of Carpenters v. NLRB, *supra* note 6.

²¹ *Id.* at 106.

²² 93 CONG. REC. 4198, 4199 (1947) (remarks of Senators Pepper, Taft).

²³ 29 U.S.C. § 158(b)(4)(A) (1947) (Supp. 1951).

²⁴ See *Hot Cargo Clauses*, 25 U. CHI. L. REV. 182 (1957).

²⁵ 29 U.S.C. § 187(b) (1947). "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court . . . having jurisdiction of the parties. . . ."

²⁶ *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96 (8th Cir. 1901). See generally, RESTATEMENT, CONTRACTS § 331(1) (1932); CORBIN, CONTRACTS §1020 (1950).

with impunity,²⁷ and this is directly contrary to the purpose of the Taft-Hartley Act concerning collective bargaining.²⁸

Left unsolved is the serious problem of the utility of the "hot cargo" clause itself. The Court refused to consider whether or not the clause was repugnant to the policy of the Taft-Hartley Act and the intent of Congress. The confusion over the relationship of the "hot cargo" clause to the secondary boycott stems from what Congress said about Section 8(b)(4)(A) and what the language of that section actually says. Congress did intend to protect innocent third parties from labor disputes in which they were not involved.²⁹ However, it is not apparent whether Congress intended such protection to extend to an employer who consented in advance to being involved. Section 8(b)(4)(A) was intended to protect not only the neutral employer, but also the public in general. It is in the public interest to have maintained the free flow of commerce and the prevention of labor disputes. If these aims can be disrupted voluntarily by the secondary employer when he puts into effect a secondary boycott in the absence of a "hot cargo" provision, it cannot be argued that there has been a waiver of the public interest. If this action can be carried out voluntarily by the union and the secondary employer, it should necessarily follow that the parties could contract to achieve the same purpose. From the language of Section 8(b)(4)(A), it would appear that unions are not prevented from engaging in secondary boycotts but rather from using certain means to effect a secondary boycott.³⁰ Therefore, it could be argued that a contract containing a "hot cargo" clause is not repugnant to the policy of the Taft-Hartley Act because the conduct it authorizes was not intended to be prohibited by the act.

The Supreme Court decision still permits three views as to the validity of the "hot cargo" clauses: that it is invalid; that it is valid and enforceable; and that it is valid but enforceable only when the employer consents. The need for legislative action is obvious.

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²⁷ Local 1976, *United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958) (dissenting opinion); *Sand Door and Plywood Co.*, 113 N.L.R.B. 1210 (1957) (dissenting opinion).

²⁸ 29 U.S.C. § 171(a) (1947). "[I]t is the policy of the United States that—(a) . . . the best interests of employers and employees can most satisfactorily be secured . . . through the processes of conferences and collective bargaining between employers and the representatives of their employees."

²⁹ 93 CONG. REC. 4198 (1947) (remarks of Senator Taft). "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice."

³⁰ *Joliet Contractor's Ass'n v. NLRB*, 193 F.2d 833 (7th Cir. 1952). Judge Learned Hand stated, "The objective of the act must be accomplished by the specific means which the section defines and not otherwise."